



Legal Update

March 3, 2014

Police officers may enter and search a home without a warrant as long as one occupant consents.

Fernandez v. California, No. 12-7822 (2013)

Background: The petitioner, Walter Fernandez (hereinafter referred to as “Fernandez”) assaulted Abel Lopez (hereinafter referred to as “Lopez”) while he was walking in an area designated to be gang territory. Lopez ran away and Fernandez along with four other men knocked Lopez down and stole his cell phone and wallet. Lopez contacted police and they searched the area for Fernandez. A witness informed police that Fernandez was in the alley. After a few minutes passed, police observed a man run through the alley and into the building that the witness had told police was where Fernandez lived. Police called for backup because they heard screaming and fighting outside of the building. When police knocked on the door, they were greeted by Roxanne Rojas (hereinafter referred to as “Rojas”) who was holding a baby and crying. Rojas’ face was red, and she had a large bump on her nose. Police also noticed blood on Rojas’ shirt and hand. Rojas told police she had been in a fight and the only person inside the apartment was her 4 year old son. One of the officers asked Rojas to step out of the apartment so he could conduct a protective sweep. Fernandez appeared at the door and said “You don’t have any right to come in here. I know my rights.” Police arrested Fernandez because they suspected he had assaulted Rojas. Lopez also identified Fernandez as his initial attacker, and police charged Fernandez with domestic assault and battery as well as armed robbery. Approximately one hour after Fernandez’s arrest, police returned to the apartment and asked Rojas if she would allow police to search the apartment. Rojas gave verbal and written consent for the search and

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police recovered gang paraphernalia, a butterfly knife, clothing worn by the robbery suspect, ammunition and a hidden a sawed-off shotgun.

Fernandez filed a motion to suppress and argued that Rojas' consent was not valid because it was given after he initially told police they were not allowed to enter his apartment. Fernandez never argued that the police did not have reasonable grounds or probable cause to arrest him. Rather Fernandez contends that if police had probable cause to arrest they would have had probable cause to obtain a warrant and therefore they should have secured a warrant prior to entering his apartment.

Conclusion: The Supreme Court held that police can enter a person's home without a warrant if one of the occupants consents. "Consent searches are part of the standard investigatory techniques of law enforcement agencies" and are "constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamonte*, 412 U. S. 218, (1973). Consent issues become more complex when there are multiple occupants involved.

The Court addressed Fernandez's arguments by examining *United States v. Matlock*, where the Court concluded that the consent of one of the occupants who possesses common authority over the premises or effects" is sufficient for police to conduct a warrantless search of a house. *United States v. Matlock*, 415 U. S. 164 (1974).

The Court distinguished this case from *Randolph* where the Court allowed a narrow exception to the consent rule. In *Randolph*, the Court found that if one of the co-occupants is "physically present" and objects to police searching the house, then that objection would be sufficient to nullify the consent of the other occupant. The distinguishing factor in *Randolph* was that he co-occupant was "physically present." *Georgia v. Randolph*, 547 U. S. 103 (2006). Contrary to *Randolph*, Rojas in this case, gave police consent to search the apartment while Fernandez was absent. Although he initially objected to police entering his home, he was not present when police asked for Rojas' consent. The Court found that his initial objection does not remain in effect indefinitely. The Court concluded that it would be wholly unreasonable and impractical to require the Court to impose time frame to a co-occupant's objection after he was removed from the house and arrested for abusing the other co-occupant. I

Commentary: This case serves as an excellent review of the issues surrounding consent to enter a premise without a warrant.

In Massachusetts, the Courts have addressed some of the complex issues surrounding consent in a few cases. The SJC found in *Porter*, that the shelter director did not have authority to allow police to search the juvenile's room because this was equivalent to a home for the juvenile and his mother. Although the shelter director had a master key and could enter the room "for professional business purposes" it did not diminish the legitimacy of juvenile's privacy interest in the room. The Massachusetts SJC declared that under *Article 14 of the Massachusetts*

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Declaration of Rights, “a person may have actual authority to consent to a warrantless search of a home by the police only if:

(1) the person is a co-inhabitant with a shared right of access to the home, that is, the person lives in the home, either as a member of the family, a roommate, or a houseguest whose stay is of substantial duration and who is given full access to the home; or

(2) the person, generally a landlord, shows the police a written contract entitling that person to allow the police to enter the home to search for and seize contraband or evidence. No such entitlement may reasonably be presumed by custom or oral agreement.” *Id.* at 264-265.

Furthermore, the SJC in *Porter*, imposed two (2) additional requirements on police when consent to search is given under the common authority.

“First ... the police officer must base his conclusion of actual authority on facts, not assumptions or impressions. He must continue his inquiry until he has reliable information on which to base a finding of actual authority to consent ...

Second ... [p]olice must not only thoroughly question the individual consenting to the search with respect to his or her actual authority, but also pay close attention to whether the surrounding circumstances indicate that the consenting individual is truthful and accurate in asserting common authority over the premises.” *Id.* at 271-272.

Commonwealth v. Porter, P. 456 Mass. 254 (2010).

Porter made it clear that in order for consent to be valid, the person must have actual or apparent authority over the premises. In addition to the owner of the property giving consent, a person who has common authority and mutual use over the property such as a co-tenant may also give police consent to search. However, a co-tenant’s authority may be limited only to common areas to be searched. As noted in ***Georgia v. Randolph***, 547 U.S. 103, 112 (2006), “when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on the premises as an occupant may lack the perceived authority to consent.” It is important to understand that that a co-tenant cannot give police consent to search over the objection of another co-tenant.

Similarly, the ***Santos*** case this year provided some guidance for police when determining whether a third party has actual or apparent authority to allow police entrance into a home.

Commonwealth v Fernando Santos, 465 Mass. 689 (2013). In ***Santos***, police were dispatched to a house for a potential rape of a child. When police arrived, the mother of the victim directed police into the first floor apartment where the victim was waiting on the couch. Based on the

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mother's direction and actions, police assumed that she had apparent authority to allow entry into the apartment even though she lived in the second floor apartment. The SJC held that the search of the premises in *Santos* was lawful based on the mother's apparent authority. Santos provided some guidance for police if it is unclear who resides in the house and there are no exigent circumstances, police can ask who has authority over the premise prior to entering. In Santos, the victim's mother led the police to first floor apartment without any objection from the grandmother who lived there. Based on these circumstances, it was reasonable for police to conclude that the victim's mother had authority over the first floor apartment.

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